90-44
NO.

IN THE

Supreme Court of the United States

TERM: OCTOBER 1989 to OCTOBER 1990

RICHARD GREEN,

Petitioner,

v.

CHARLES RICHARD SNOW and
JANET LEE SNOW,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

C. Waverly Parker, Esquire
314 Madison Road
P.O. Box 261
Standardsville, VA 22973
(804) 985-2252

Counsel for Petitioner

Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

THE QUESTION PRESENTED FOR REVIEW

The question presented for review in this case is:

Whether the United States Court of Appeals for the Fourth Circuit erred in holding --- despite the provisions of 11 U.S.C. 522(b) granting to Virginia and the other States the privilege (which has been exercised by Virginia and many other of the States) of determining the nature of the property exemptions which their respective citizens might utilize in bankruptcy --- that the debtors Snow could avoid, under 11 U.S.C. 522(f), the judicial lien imposed upon certain of their property to satisfy the petitioner Green's judgment for rent, where the law of Virginia so delimits the exemption it gives that there is excluded from such exemption all property otherwise leviable or subject to process on a claim for rent.

REQUIRED STATEMENTS

There are no parties to this proceeding who are not named in the caption of the proceeding.

There is no parent or subsidiary company involved in this case, nor is any required to be listed.

This case does not involve the constitutionality of any statute, and no court of the United States has, pursuant to 28 U.S.C. section 2403, certified to any state attorney general the fact that the constitutionality of a statute of his State is drawn into question.

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REFERENCES TO REPORTS OF THIS CASE

In the United States Bankruptcy Court for the Western District of Virginia this case was reported as In Re Snow, 71 Bankr. 186 (Bankr. W.D. Va. 1987).

In the United States District Court for the Western District of Virginia this was reported as Snow v. Green (In re Snow), 92 Bankr. R. 154 (D.C.W.D. Va. 1988).

In the United States Court of Appeals for the Fourth Circuit the opinion and judgment in this case is Snow v. Green (In Re Snow), 899 F.2d 337 (4th Cir. 1990), decided 3 April 1990.

JURISDICTION OF THIS COURT

The date of entry of the judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was 3

April 1990. There was no request for rehearing in that court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE

The following constitutional provisions, treaties, statutes, ordinances and regulations are involved in this case:

11 U.S.C. section 522

Va. Code Ann., section 34-3.1
Va. Code Ann., section 34-4
Va. Code Ann., section 34-5

These items of legislation are all set forth in the appendix to this brief.

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STATEMENT OF THE CASE

On 15 October 1986 Richard Green

obtained a state court judgment for $1352 against Charles Richard Snow and Janet Lee Snow. This judgment was granted on a demand for unpaid rent.

On 29 October 1986 Green obtained a writ of fieri facias on the judgment and placed the writ in the hands of the Sheriff of Greene County. On 5 November 1986 the Sheriff gave execution to this writ by levying upon sundry personal property of the Snows, including an automobile. However, on 10 November 1986 the Snows recorded a homestead deed as per section 34-14 of the Code of Virginia, claiming all the property levied to be exempt. Then, on 12 November 1986, the Snows declared voluntary bankruptcy, for that purpose instituting a proceeding in the United States Bankruptcy Court for the Western District of Virginia.

In their bankruptcy petition the

Snows duly continued their claim that the property levied was all exempt. However, Green filed various objections to these exemptions. In particular, he averred that, under Va. Code Ann. sections 34-4 and 34-5, homestead in Virginia does not extend to a levy on a demand for unpaid rent. In response, the Snows filed a standard form Motion to Avoid Lien under section 522(f)(1) of the Bankruptcy Code (title 11, U.S.C.). That motion averred:

> . . . .
>
> 4. That the lien of the secured creditor impairs an exemption to which the Debtor would have been entitled under Bankruptcy Code section 522(b).
>
> . . . .
>
> 7. That pursuant to Bankruptcy Code section 522(b) the subject property [which the Sheriff had levied and as to which the homestead deed had been filed] may be claimed as exempt ***

11 U.S.C. section 522(b) provides that a debtor in bankruptcy may

elect between the federal scheme of exemptions provided in 11 U.S.C. section 522(d), on the one hand, and the scheme of exemptions otherwise effective in his state of residence, on the other hand. However, section 522(b)(1) further provides that this election is not available, and that the state scheme of exemptions must alone be followed, in states which have opted to have their own exemption scheme apply in lieu of the federal scheme. Virginia is among the states so opting. Va. Code Ann. section 34-3.1.

Notwithstanding what is stated in the preceding paragraph and the express provision of Va. Code Ann. section 34-5 (5) excluding claims for rent from the operation of section 34-4 otherwise granting homestead, the Bankruptcy Court (properly taking jurisdiction under 28 U.S.C. sections 1334, 151 and 157 (a) and

(b)) held that the Snows' motion under 11 U.S.C. 522(f)(1) was well taken. An opinion and a final order to this effect was entered by that Court in appropriate adversary proceedings on 17 March 1987. In re Snow, 71 Bankr. 186 (Bankr. W.D. Va.1987). However, the Bankruptcy Court stayed execution of its order until there should be an order final on appeal.

From the judgment of the Bankruptcy Court Richard Green appealed to the United States District Court for the Western District of Virginia. On consideration of that appeal, Snow v. Green (In Re Snow), 92 Bankr. R. 154 (D.C.W.D. Va. 1988), the United States District Court reversed, holding inter alia that the avoidance power of 11 U.S.C. section 522(f) does not come into play unless it has first been ascertained that there is actually a right to an exemption under

state law as seemingly permitted to control under 11 U.S.C. section 522(b), and that in Virginia the exemption claimed, being for rent, is excluded from the operation of Va. Code Ann. section 34-4 (the provision otherwise granted such exemption) by Va. Code Ann. sections 34-5.

From the judgment of the District Court the Snows appealed. Upon consideration of that appeal the United States Court of Appeals for the Fourth Circuit reversed, in a published opinion, Snow v. Green (In re Snow), 899 F.2d 337 (4th Cir. 1990), decided 3 April 1990), holding that there would be a right to an exemption under state law absent the lien claimed by Green, and that, as a result, 11 U.S.C. section 522(f) permits the debtors to avoid the lien.

In its opinion, at note 4, the Circuit Court of Appeals for the Fourth

Circuit noted that on the point of bankruptcy law at hand Hall v. Finance One of Georgia, Inc., 752 F.2d 582 (11th Cir. 1985), and In Re Leonard, 866 F.2d 335 (1989), with which the Fourth Circuit agreed (and with which In Re Thompson, 884 F.2d 1100 (8th Cir. 1989), seems to agree), are contrary to the decisions in McManus v. Avco Financial Services (In Re McManus), 681 F.2d 353 (5th Cir. 1982), and Giles v. Credithrift of America, Inc. (In Re Pine), 717 F.2d 281 (6th Cir. 1983), cert. denied 466 U.S. 928, 104 S.Ct. 1711, 80 L.Ed. 183 (1984). Because of the divergence of opinion between the circuit courts of appeal this petition for certiorari is filed.

ARGUMENT

CONSIDERATIONS AFFECTING REVIEW, AND INTRODUCTION

In filing this petition Richard Green is particularly mindful of U.S. Sup. Ct. Rule 10.1(a), to the effect that there may be reason for this Court to grant certiorari "when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." As shown in the Statement of the Case, that is the situation here; and the United States Court of Appeals for the Fourth Circuit, at footnote 4 of its opinion, acknowledges that situation.

In the present case the Fourth Circuit's decision is foursquare with that found in In Re Lawson, 42 B.R. 206 (Bankr. E.D. Ky. 1984), reversed sub nom. Credi-

thrift of America v. Lawson, 52 B.R. 369 (D.C.E.D. Ky. 1985), in the light of Spears v. Thorp-Credit, Inc. of Ohio, 744 F.2d 1225 (6th Cir. 1984), which reversal the Sixth Circuit affirmed without published opinion, and as to which reversal this Supreme Court denied certiorari at 479 U.S. 1036, 107 S.Ct. 889. The course of the Lawson case is persuasive in considering whether on the present petition certiorari should be granted.

The Sixth Circuit decided Giles v. Credithrift of America, Inc. (In Re Pine), supra, in 1984. As stated above, Pine holds to the contrary of the circuit court decision in the case in which certiorari is now sought. Notwithstanding Pine, and indeed in the face of it, the U.S. Bankruptcy Court for the Eastern District of Kentucky in 1986 decided Lawson contrary to Pine. Perhaps

because the Lawson bankruptcy court must have realized it was proceeding against contrary higher authority in its own circuit, that court wrote what could be referred to as a seminal defense of the position taken by the Snows in the courts below. In essence, the decision of the Fourth Circuit in the present case is the same as the decision of the bankruptcy court in Lawson.

Before an appeal of Pine could be heard in the U.S. District Court for the Eastern District of Kentucky, the Sixth Circuit had decided Spears, supra, which plainly followed its own earlier holding in Pine. Accordingly, the United States District Court for the Eastern District of Kentucky reversed its bankruptcy court's decision in Lawson. The debtors in Lawson then appealed to the Sixth Circuit. When, as might have been

expected, they were denied relief there, they requested certiorari from this Supreme Court, but, in spite of the quality of the bankruptcy court's opinion in Lawson, which is the best statement that can be made for the position taken by the Snows in the present case, the Supreme Court denied certiorari in Lawson, as it had when it had considered a similar petition in Pine. It is thus not surprising that, at least until the Fourth Circuit spoke in the present case, and subject to what this Supreme Court may do in same, the Eastern District of Virginia was of one opinion on the point at hand, In re Shines, 39 Bankr. 879 (Bankr. E.D. Va. 1984), and the Western District of Virginia, although initially of the same view as expressed in Shines, In re Barnes, 29 Bankr. 677 (Bankr. W.D. Va. 1983), had come, through its bankruptcy court in the

instant case and prior to the decision of the district court, to the other view.

Petitioner recognizes that it is generally not the function of the Supreme Court to determine conflicts of authority between the bankruptcy courts or between the district courts. But here, in the present case, the conflict does not end there, but extends into the circuit courts, with the Fifth and Sixth Circuits on one side of the question, and the Tenth and Eleventh Circuits, and arguably the Eighth, and now the Fourth, subject to what may be done herein, on the other side. Compare Giles, supra, and McManus, supra, with Leonard, supra, Hall, supra and Thompson, supra. The result is that the same case would be decided in an opposite manner, with regard to the application of federal law, depending on which side of the Virginia/Kentucky line the

debtors resided.

Nor is this case devoid of legal interest. While no constitutional questions are raised, and while there is in this case the ever-present tension between state and federal law, there is more of the latter than usually appears; for in the present case the Congress, in a well-known last minute compromise that rendered the legislative history in each house a somewhat dubious indicator of what the present statute means, concluded to defer to each state, if (as has Virginia) it so chose, in the application of its own policy relative to exemptions. Precisely <u>how far</u> that Congressionally mandated deference was to run is the gist of the issue in this case; but it may be said at this juncture that it would be exceedingly odd if what Congress intended, as the Fourth Circuit would have it, is that the State

of Virginia could have the authority, not only for debtors not in bankruptcy but also for debtors in bankruptcy, to abolish altogether the exemption granted by Virginia Code section 34-4 and yet, for debtors in bankruptcy, cannot in a nondiscriminatory way shape the boundaries of that same exemption as it sees fit, and as has always been done through integral reading of Virginia Code section 34-5 with Virginia Code section 34-4.

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT COURT ERRED IN HOLDING --- DESPITE THE PROVISIONS OF 11 U.S.C. 522(b) GRANTING TO VIRGINIA AND THE OTHER STATES THE PRIVILEGE (WHICH HAS BEEN EXERCISED BY VIRGINIA AND MANY OTHER OF THE STATES) OF DETERMININC THE NATURE OF THE PROPERTY EXEMPTIONS WHICH THEIR RESPECTIVE CITIZENS MIGHT UTILIZE IN BANKRUPTCY --- THAT THE DEBTORS SNOW COULD AVOID, UNDER 11 U.S.C. 522(f), THE JUDICIAL LIEN IMPOSED UPON CERTAIN OF THEIR PROPERTY TO SATISFY THE PETITIONER GREEN'S JUDGMENT FOR RENT, WHERE THE LAW OF VIRGINIA SO DELIMITS THE EXEMPTION IT GIVES THAT THERE IS EXCLUDED FROM SUCH EXEMPTION ALL PROPERTY OTHERWISE LEVIABLE OR SUBJECT TO PROCESS ON A CLAIM FOR RENT.

This matter came to the Court of Appeals for the Fourth Circuit on an appeal by the respondents Snow from a judgment of the United States District Court for the Western District of Virginia reversing a decision of the United States Court of Bankruptcy for such District which would have allowed the Snows to avoid the fixing of the petitioner Richard Green's judicial lien on property claimed by the Snows to be exempt under the Vir-

ginia homestead exemption, sections 34-4 and 34-5 of the Code of Virginia.

The Bankruptcy Reform Act of 1978 created a series of exemptions for those entering bankruptcy. 11 U.S.C 522. However, paragraph (b)(1) also gave each state the power to opt out of that structure of exemptions. This "opt out" provision was the result of legislative compromise. The House of Representatives wanted to create a structure of exemptions where the debtor could choose between the federal exemption structure and those exemptions afforded by the debtor's state law. On the other hand, the Senate preferred to restrict all debtors to only those exemptions afforded them under their state law. Haines, Section 522's Opt Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State, 1983 Ariz. St. L.J. 1, 5-10; Klee, Legislative History of the New Bankrupt-

cy Law, 28 De Paul L. Rev. 941, 952-57 (1979); Ulrich, How Bankruptcy Exemptions Work: Virginia as an Illustration of Why The "Opt Out" Clause Was A Bad Idea, 8 G.M.U. L. Rev. 1, 2 (1985).

Virginia is one of the majority of states which have chosen to opt out and to restrict their domiciliaries to the structure of exemptions provided by the State Code. Virginia Code section 34-3.1 (1984). Within a year after the passage of the Bankruptcy Reform Act, the General Assembly for the Commonwealth of Virginia opted out of what are "the concededly more liberal federal exemptions." In Re Boyd, 11 Bankr. 690, 693 (Bankr. W.D. Va. 1981). One of the exemptions to which debtors have recourse for their protection in Virginia is the homestead exemption. This provision, Va. Code section 34-4 (1984) provides, in relevant part, that

> Every householder or head of a family residing in this State shall be entitled . . . to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding $5,000.

The Virginia homestead exemption is qualified by certain statutorily created limits. Under the terms of the section 34-5 of the Code of Virginia the homestead exemption "shall not extend" to property otherwise leviable "on any demand in the following cases":

> (1) For the purchase money of property or any part thereof. * * * *
>
> (2) For services rendered by a laboring person or mechanic.
>
> (3) For liabilities incurred by an public officer or officer of a court, or any fiduciary, or any attorney at law for money collected.
>
> (4) For a lawful claim for any taxes, levies or assessments.
>
> **(5) For rent.**

> (6) For the legal or taxable fees of any public officer or officer of a court.
>
> (7) [In a shifting stock of merchandise] or in any property the conveyance of which . . . has been set aside on the ground of fraud or want of consideration. * * * *
>
> (8) For the support of minor children.

11 U.S.C. 522 creates a mechanism under which a debtor can avoid the imposition of a judicial lien. That section provides, in pertinent part, that

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor to the extent that such lien impairs an exemption to which the debtor would have been entitled **under subsection (b) of this section,** if such lien is * * * a judicial lien * * * *

For opt out states like Virginia, subsection (b) of section 522 provides that a bankruptcy debtor may exempt from property of the estate created by his bankruptcy any property that is exempt "under * * *

State * * * law". Moreover, the first lines of subsection (b) of section 522 and subsection (c) of that section, when read together with 11 U.S.C. 541, provide that what property a debtor can exempt is neither a part of such estate nor (with exceptions not here pertinent) liable for his pre-bankruptcy debts.

The Snows rely on 11 U.S.C. 522(f) in their effort to avoid the appellee Green's lien that attached prior to the Snows' bankruptcy on their property claimed under the Virginia homestead exemption.

The Code of Virginia is but one Act. By the plain language of that Code the Virginia legislature undoubtedly intended not only to create a homestead exemption but also to define the limits of that exemption in such a way that certain claims could not ever be subject thereto.

Va. Code section 34-4, 34-5. Counterpoised to that scheme, section 522(f)(1) of the Bankruptcy Code creates a mechanism whereby debtors can avoid liens on property which would otherwise have been exempted, except for that lien. 11 U.S.C. section 522(f)(1). There lies the potential for an apparent conflict between state law and federal bankruptcy provisions. Richard Green concedes that if this conflict is real, rather than merely apparent, the Supremacy Clause of the federal Constitution mandates that the bankruptcy statute will govern. Perez v. Campbell, 402 U.S. 637, 91 S. Ct. 1704, 29 L. ed. 2d 233 (1971). Because Congress has the power under the Constitution to establish uniform bankruptcy laws, U.S. Const. Art. 1, section 8, and has enacted a specific provision for exemption, 11 U.S.C. section 522, the federal courts

must adopt an interpretation of Virginia's law that does not conflict with the Bankruptcy Code's exemption provisions. Cheeseman v. Nachman, 656 F.2d 60 (4th Cir. 1981).

It is important to distinguish between subsection (b) of 11 U.S.C. 522, which provides for federal exemptions and allows states to opt out of the federal exemption scheme, and to put in place the particular exemption scheme of the state, and subsection (f), which creates the mechanism of lien avoidance. The opt out power of the states applies to subsection (b) and not to subsection (f). States cannot opt out of the lien avoidance mechanism. However, the lien avoidance mechanism refers back to the structure of exemptions as defined in subsection (b), whether that structure is derived directly from the federal provisions or from the

state provisions which are substituted for those federal provisions. When one examines the interaction between subsections (b) and (f), it is evident that the ostensible conflict between Virginia's exceptions to its homestead exemption and the lien avoidance provision of section 522(f) is only an apparent or facial conflict. In the throes of this conflict the court below has put less than the full Virginia homestead structure into the niche provided in subsection (b).

Below, the circuit court read this case as involving a clash between claims growing out of the federal lien avoidance procedure and the supposed "exceptions" to the Virginia homestead exemption and thus saw its charge as having to vindicate one claim or the other. It then resolved the perceived conflict by ruling that the lien avoidance procedure of sec-

tion 522(f) negated the exception, in this case for rent, to Virginia's homestead exemption. The conclusion of the circuit court was thus like that of the bankruptcy court, which opined that

> The use of the phrase 'would have been entitled' denotes a condition contrary to fact. Thus, the court reads section 522(f) as permitting the debtor to avoid a lien if the lien impairs an exemption the debtor could claim under state [law] but for the lien. [Emphasis in original.]

However, the decisions of both the circuit and the bankruptcy courts misidentified what counts as the relevant "condition contrary to fact." If one reads the "condition contrary to fact" clause of section 522(f) as broadly as did these courts, then, under such courts' analysis, the lien avoidance procedure seemingly would sweep in every limitation to the homestead exemption under state law and would render all those limitations a null set. Thus,

all limitations upon exemptions that are defined by the type of claim allowed would, by their very nature, be liable to negation by the lien avoidance procedure.

The difficulty in this ruling is that it misreads the scope of the Virginia homestead exemption. In effect, the court below takes the Virginia homestead exemption simpliciter to be encompassed only by Virginia Code section 34-4 and lops off the limitations enumerated in section 34-5. The court thus adopts a linear view of the way the homestead exemption works. According to the court, a debtor claims certain property under the homestead exemption as a discrete action. Only after the dust has settled from that process of claiming does one then turn to look at the types of claims advanced by a creditor under the limitations upon that exemption. The court below interposed the "condition

contrary to fact" gloss as a trip-wire between these two steps and hence wedged the lien avoidance procedure of 11 U.S.C. 522(f) between section 34-4 and section 34-5 of the Virginia Code.

The problem with this interpretation is that it presents an incomplete picture of the Virginia homestead exemption. It is not the case that the exemption exists pristine, without limitation, pervasive, discrete and absolute, and that then, only further down this imagined linear continuum, does one encounter the question of limitations on the exemption and their relation to the lien avoidance procedure. Rather, it is the case that the Virginia homestead exemption, taken as a whole, includes both the universe of what a debtor can claim as an exemption and the limitations upon what can be claimed under that exemption. Per-

haps an appropriate, if very informal, metaphor to use in describing the Virginia homestead exemption is to compare it to a wedge of Swiss cheese. Just as the entirety of the wedge is composed of both the cheese and the holes, the entirety of the Virginia homestead exemption is composed both of the substantive provision allowing a debtor to exempt certain property and the exceptions to that exemption which, in the metaphor, constitute the holes. Properly understood, the holes are a part of that wedge of cheese and one takes that wedge subject to the holes. Indeed, the holes are among the natural edges of the wedge. Therefore, in the present case, the "condition contrary to fact" mechanism to which the bankruptcy court referred actually cannot come into play. The Snows cannot point to an exemption to which they would otherwise have

been entitled for lien avoidance purposes, because one natural chink or hole in the homestead exemption protection which they claim is the limitation relating to claims for rent. When a debtor claims under the homestead exemption he claims subject to all the limitations upon the exemption implied by that claim. The "hole" in the exemption is simply a part of the exemption structure itself. The exemption, taken in its entirety, includes its own limitations. To hold otherwise is to eviscerate virtually all instances under which the limitations to the Virginia homestead exemption could exist, for a debtor could invoke the doctrine of a "condition contrary to fact" and say that "but for this claim [e.g., for rent, for taxes, for services rendered by a mechanic, etc.] this property would be exempt and, therefore, it is exempt." That is,

indeed, what the Fourth Circuit now says.

In point of fact, in several instances bankruptcy courts in Virginia have interpreted the Virginia homestead exemption to include both the cheese and the holes and, thus, have recognized the vitality of creditor claims under the exceptions to the homestead exemption provided in section 34-5 of the Virginia Code. In re Shines, 39 Bankr. 879 (Bankr. E.D. Va. 1984); In re Barnes, 29 Bankr. 677 (Bankr W.D. Va. 1983). In both of these cases a debtor sought to protect wages from garnishment under the provisions of the homestead exemtpion, but in both cases a creditor was allowed to reach those wages to satisfy a debt for rent. In the earlier case, the bankruptcy court concluded that:

> By virtue of Va. Code section 34-3.1, Virginia has excluded itself from the federal exemptions provided in section 522 and consequently, the

> exemption statutues contained in the Code of Virginia prevail. Va. Code 34-4 provides for the exemption of wages under garnishment along with other enumerated exemptions. Va. Code section 34-5, however, designates kinds of debts which cannot be exempted under section 34-4. Among these categories is a debt for rent. Plaintiff is therefore not entitled to exempt the subject wages. [In re Barnes, 29 Bankr at 678.]

Although the Barnes conclusion is succinctly stated, without a great deal of exposition on point, it is precisely that conclusion which should still prevail.

This case pits the rule of decision in McManus v. Avco Finanial Services of Louisiana, Inc. (Matter of McManus), 681 F.2d 353 (5th Cir. 1982); Giles v. Credithrift of America, Inc. (In re Pine), 717 F.2d 281 (6th Cir. 1983), cert. denied. 466 U.S. 928, 104 S. Ct. 1711, 80 L. ed. 2d 183 (1984); and Allen v. Hale County State Bank (Matter of Allen), 725 F.2d 290 (5th Cir. 1984); against the rule of decision in Baxter v.

Kaiser (In re Baxter), 19 B.R. 674 (Bankr. App. Panel, 9th Cir. 1982); Hall v. Finance One of Georgia, Inc. (In re Hall), 752 F.2d 582 (11th Cir. 1985); and Aetna Finance Co. v. Leonard (In re Leonard), 886 F.2d 335 (10th Cir. 1989). The court below relied on the Hall and Leonard cases, while petitioner must rely on McManus, Giles and Allen. The Fourth Circuit acknowledged this conflict. Note 4 to its opinion. That court also cites to Matter of Thompson, 750 F.2d 628 (8th Cir. 1984), but, as the court itself implies, this case really does not speak to the precise point at hand. In Thompson, there is no dispute over the extent of permissible operation of state law under 522(b) in light of the limitations set forth in 522(f). To the contrary, the state exemption statute was allowed full operation, and only after the status of the property

sought to be exempted thereunder had been determined were the provisions of 522(f) applied. Accordingly, support for the position taken by debtors is not seen in the Eighth Circuit.

In general, the Leonard and Hall line of cases views the clash between 11 U.S.C. 522(f) and various state exemption statutes as being one of federal law versus state law, with the inevitable result that federal law prevails. On the other hand, the McManus line views section 522(f) as having adopted the respective state schemes of exemption with the force of federal law. In so doing the MaManus line effectively reasons, as this appellee now contends, that when Congress chose to use the words "under subsec-tion (b)" in section 522(f), knowing that 522(b) itself adopted state law, then Congress intended (however effective or ineffective this may

have been in furthering a "fresh start" policy) to have the courts apply the whole each state's scheme of exemptions with respect to lien avoidance under section 522(f).

In Leonard, the Appeals Court is dealing with the interaction of federal and Colorado law. Colorado has "opted out"; allows exemption of household goods to the extent of $1500 in value; and, under section 13-54-101(5), defines value as the difference between fair market value and the amount of the lien. Colorado law, like that of of Georgia, Tennessee and Louisiana, can be said to result in an effective opting out of the lien avoidance provision of 522(f) if it were allowed full operation in bankruptcy.

In Hall, the Appeals Court was likewise confronted with a state statute which, if allowed full operation in the

federal setting, would result in an effective opting out from and the nullification of 522(f): Georgia law permits a debtor in bankruptcy to exempt property only if it is not encumbered by a lien. The decision in Hall is contrary to those in Pine and McManus, but Pine dealt with the same Georgia statute as did Hall, and with a Tennessee statute which also excluded all aliened property, by stating that only the debtor's equity interest was subject to exemption (Pine, 283); and the McManus court was faced with the same problem, where Louisiana law mandated that household goods and furnishings subject to chattel mortgages were not exemptible.

It can be argued that where the state's law is written in such a way that the result is arguably the virtual nullification of the federal lien avoidance provision, then such law has indeed gone

too far. However, this is not the case in Virginia. Unlike the states involved in Leonard and Hall, Virginia makes no attempt to restrict its exemption so that liened property is not exempt to the extent of the lien. No substantial change, and no change whatsoever material to this case, has been made by Virginia to its homestead exemption in years and years. Certainly, no such was a response to the Bankruptcy Reform Act, as was the situation in Leonard and Hall.

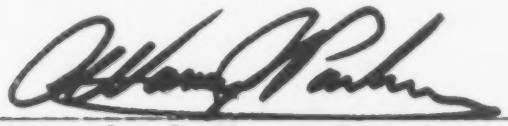
Finally, as stated in the introduction to this argument, it is difficult to see how, if under 11 U.S.C. 522(b) States are to be permitted to fashion schemes of exemption on their own, even to the point of deleting an entire exemption such as the one in this case, the Court of Appeals can legitimately object to deletion in part, which is all that Va. Code

section 34-5 does.

CONCLUSION

For the reasons stated, the petitioner Richard Green prays that in this case certiorari issue to the judgment of the United State Court of Appeals for the Fourth Circuit, and that in due course such judgment be reversed, with costs in this Court to be assessed in favor of Green.

Respectfully submitted,



C. Waverly Parker, Esquire
Counsel of record for the
Petitioner Richard Green
(A member of the Bar of this
Court admitted 26 August 1971)
314 Madison Road
P.O. Box 261
Stanardsville, Va. 22973
(804) 985-2252
FAX (804) 985-6331

A P P E N D I X T O P E T I T I O N

THE OPINION AND JUDGMENT OF THE COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-1786

In Re: CHARLES RICHARD SNOW AND JANET LEE SNOW,

Debtors

- -

CHARLES RICHARD SNOW; JANET LEE SNOW,

Plaintiffs - Appellants,

versus

RICHARD GREEN,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., District Judge. (CA-87-35-C)

Argued: October 4, 1989
Decided: April 3, 1990

WIDENER, Circuit Judge:

On October 15, 1986, Richard Green obtained a Virginia state court judgment against Charles and Janet Snow for unpaid rent. On October 29, 1986, Green obtained a writ of fieri facias to execute to satisfy that judgment. On November 5, 1986, the sheriff levied on some of the Snows' personal property. Five days later, on November 10, 1986, the Snows filed a homestead deed in accordance with Va. Code section 34-14 in order to exempt the property which had been levied upon. The Snows filed a voluntary Chapter 7 petition on November 12, 1986.

The Snows then filed a motion in the bankruptcy court to avoid the lien of the judgment pursuant to 11 U.S.C. section 522(f) of the Bankruptcy Code,

which motion was granted and the property was held to be exempt.[1] On appeal, the district court reversed and decided that the personal property of the Snows was not exempt from the judicial lien. The Snows appeal from that decision, and we reverse.

The only issue on appeal is whether 11 U.S.C. section 522(f) allows the Snows to avoid the judicial lien on their personalty. In order to resolve this question, we must first examine 11 U.S.C. section 522 and its relation to Va. Code sections 34-4 and 34-5 under the Bankruptcy Code.

The portion of the Bankruptcy Code which allows a debtor to avoid a judicial lien is 11 U.S.C. section

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[1] In re Snow, 71 Bankr. 186 (Bankr. W.D. Va. 1987).

522(f), which provides in pertinent part:

> [T]he debtor may avoid the fixing of a lien on the interest of the debtor to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -
>
> (1) a judicial lien . . . .

11 U.S.C. section 522(f). In order to apply this section, however, we must first consider the provisions allowing a debtor to exempt property from the estate.

Exemptions from the bankrupt estate are treated in 11 U.S.C. section 522(b). That section provides in part:

> [A]n individual debtor may exempt from the property of the estate the property listed in either paragraph (1) or in the alternative, paragraph (2) of this subsection . . . .
>
> (1) the property that is specified under subsection (d) of this section, unless the State law that is applicable to

> the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition . . . .

The Code thus allows the debtor to choose between federal exemptions or those allowed under state law unless the State restricts the debtor to state exemptions pursuant to section 522(b). Virginia has so restricted debtors by enacting Va. Code section 34-3.1 which precludes Virginia debtors from using the federal exemptions provided in section 522.[2]

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[2] No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of section 522 of the Bankruptcy Reform Act (Public Law 95-598), except as may otherwise be

Consequently, a debtor is limited to the exemptions provided by the Virginia statute.

With the creation of exemptions, however, Virginia also created exceptions to the exemptions. Section 34-5 of the Virginia Code lists these exceptions and provides in pertinent part:

> Such exemption shall not extend to any execution order or other process issued on any demand in the following cases: . . . .
>
> (5) For rent.

Va. Code section 34-5.

Green argues that Va. Code section 34-5(5) precludes the debtors' use of the lien avoidance mechanism in 11 U.S.C. section 522(f)(1).

Both the House and Senate

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expressly permitted under this title. Va. Code section 34-3.1.

versions of the bill that became the lien-avoidance section, section 522(f), allow liens to be avoided, "to the extent the property could have been exempted in the absence of the lien . . . ." H.R. Rep. No. 595, 95th Cong., 1st Sess. 362 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6318; S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5862. The legislative history illustrates the concern which the law was designed to address by stating:

> [T]he bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may void any judicial lien on exempt property, and any nonpurchase money security interest in certain exempt property such as household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy.

> Bankruptcy exists to provide relief for the overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 127 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 6087-88. (Footnote omitted.) This persuasive language certainly indicates the intent of Congress as to the effect of section 522(f). Case law supports this conclusion as well.

- In Hall v. Finance One of Georgia Inc., 752 F.2d 582 (11th Cir. 1985), the Eleventh Circuit decided the same issue presented here. Georgia, as has Virginia, had exercised its option to require exemptions to be claimed under state law rather than federal, and had provided that certain property could not be claimed as exempt to the extent it was

encumbered by a lien. See Ga. Code Ann. section 44-13-100(a)(4).[3] The court permitted the lien on the exempt property to be avoided, however, and interpreted section 522(f) to mean that the "section operates to permit a debtor to avoid the fixing of a lien on property if that avoidance would allow the debtor to enjoy an exemption." Hall, 752 F.2d at 586. The court further noted that it did not "suggest that states are prohibited from defining lien-encumbered property as not exempt. Any such decision would, however, be subject to the provisions of section 522(f)." Hall, 752 F.2d at 586. Thus, Hall is a direct holding that

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[3] The statute referred to an exemption of "debtor's interest" and was construed to mean only the equity the debtor had in the property was exempt. Hall, 752 F.2d at 585.

section 522(f) allows a debtor to avoid a lien if such avoidance will allow a debtor to exempt property that state law would treat as non-exempt because of a lien.

In In Re Leonard, 866 F.2d 335 (10th Cir. 1989), the court was faced with essentially the same fact situation which was present in Hall. A Colorado statute had exempted household goods to the extent of $1,500 in value, but value was defined as the difference between fair market value and the amount of any lien, so that the result was the same as in Georgia, personal property subject to a lien was not exempted, although the same property would have been exempted if not subject to the lien. The court held that the debtor could avoid the lien under section 522(f). It stated that the

way to determine a debtor's right to lien avoidance is to consider whether the property, if encumbered, is exempted under the state statutory exemptions. If unencumbered property may be exempted under the state exemptions, then any non-possessory non-purchase money lien on that property could be avoided under section 522(f). 866 F.2d at 336-37. And just as importantly, the court reasoned:

> Congress did not say a debtor is entitled to avoid a lien to the extent the debtor <u>is</u> entitled to an exemption, which is the construction Appellant is urging us to adopt.

866 F.2d at 337 (emphasis in original).

The court continued:

> Stated differently, since Colorado law allows the property to be exempted if no security interest exists, a security interest could be avoided under section 522(f).

866 F.2d at 337.

Although decided in the context of a waiver, the case of In Re Thompson, 884 F.2d 1100 (8th Cir. 1989), is in accord with Hall and Leonard, as is the reasoning in In Re Brown, 734 F.2d 119 (2d Cir. 1984), although in Brown no state statute limited exempt property as did the statutes in Hall and Leonard.

Finally, our own case of Dominion Bank of Cumberlands, N.A. v. Nuckolls, 780 F.2d 408 (4th Cir. 1985), has considered the reach of section 522(f), but in the context of a waiver. That case held that the lien of a security agreement on personal property could be set aside under the literal terms of section 522(f) because the property was subject to an exemption by way of homestead deed, which exemption, however, had been validly waived under

state law. Beside demonstrating that we have given literal effect to the remedial provisions of section 522(f), we note that Dominion Bank relied upon the Senate Report with respect to the Bankruptcy Code, which we quote and rely upon again:

> [Section 522(f)] protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien, and may similarly avoid a nonpurchase-money security interest in certain household and personal goods. The avoiding power is independent of any waiver of exemptions.

S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5862.

It is noteworthy and we have demonstrated that that part of the Senate Report we relied upon in Dominion Bank

and upon which we rely here was also relied upon by the court in Hall, 752 F.2d at 587, and Leonard, 866 F.2d at 337 N.2. As we have previously noted, key parts in the House and Senate Reports coincide.[4]

The property exempted by homestead deed in this case which was levied on by the sheriff includes such items as: a 1981 Ford Fairmont automobile, of a value of $800; a 10-year old television; and a lamp. It is beyond argument that these items were subject to

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[4] In Re McManus, 681 F.2d 353 (5th Cir. 1982), and In Re Pine, 717 F.2d 281 (6th Cir. 1983), are contrary to the decisions in Hall and Leonard. They rely on the reasoning that the avoidance power of section 522(f) does not come into play unless it has been ascertained there is actually a right to an exemption under section 522(b) under state law, not that there would be a right to an exemption under state law absent the lien to be set aside as we hold.

homestead exemption under section 34-4 of the Virginia Code had they not been subject to the lien of Green's judgment for rent. In the words of the Leonard court, and changing only the word Colorado to Virginia, "since [Virginia] law allows the property to be exempted if no security interest exists, a security interest could be avoided under section 522(f)." 866 F.2d at 337.

The judgment of the district

court is accordingly

REVERSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-1786

In Re: CHARLES RICHARD SNOW AND
JANET LEE SNOW,

Debtors

- -

CHARLES RICHARD SNOW; JANET LEE SNOW,

Plaintiffs - Appellants,

v.

RICHARD GREEN,

Defendant - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

April 3, 1990

THE OTHER OPINIONS AND ORDERS RENDERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

IN RE:

CHARLES RICHARD SNOW and
JANET LEE SNOW

Debtors.

Case No. 686-01203

RICHARD GREEN

Plaintiff

v.

CHARLES RICHARD SNOW and
JANET LEE SNOW

Defendants

Adversary Proceeding No. 686-01203(1)

CHARLES RICHARD SNOW and
JANET LEE SNOW

Plaintiffs

v.

RICHARD GREEN

Defendant

Adversary Proceeding No. 686-01203(2)

MEMORANDUM OPINION

This case presents the question of whether a debtor may, pursuant to 11 U.S.C. section 522(f)(1), avoid the fixing of a judicial lien on property that in the absence of the lien would be exempt under state law, even though state law defines the property as nonexempt because it is encumbered by a judicial lien arising out of a claim for unpaid rent.

This is a core proceeding which the court may properly hear and deter-

mine. 28 U.S.C. section 157(b)(1).

BACKGROUND

The facts of this case are brief and undisputed. On October 15, 1986, Richard Green ("the creditor") obtained a state court judgment for $1,352 against the debtors, Charles and Janet Snow ("the debtors"). The judgment was based on unpaid rent due the creditor.

The creditor, in an effort to satisfy his judgment, obtained a writ of fieri facias and levied against various items of the debtors' personal property.[1] By operation of Virginia law, this process created a lien on that property in favor of the creditor. Va. Code section 8.01-478 (1984 Repl. Vol.)

The debtors recorded a homestead deed on November 1, 1986. Among other items of personal property the deb-

tors claimed the property levied upon by the creditor as exempt pursuant to Va. Code 34-4. Subsequently, on November 12, 1986, the debtors filed a joint petition under Chapter 7 of the Bankruptcy Code.

The debtors seek to avoid the creditor's judicial lien pursuant to 11 U.S.C. section 522(f)(1), asserting that the lien impairs an exemption to which they would have been entitled. The creditor seeks to enforce his lien in the property levied upon, claiming that Va. Code section 34-5(5) precludes the debtors' use of the lien avoidance mechanism of 11 U.S.C. section 522(f)(1) here because Va. Code section 34-5(5) renders the debtors' exemption of that property inapplicable to him.

DISCUSSION

Section 522(f)(1) of the Bank-

ruptcy Code, which governs the avoidance of judicial liens, provides in pertinent part:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is . . . a judicial lien . . . .

11 U.S.C. section 522(f)(1) (West 1987) (emphasis added). Thus, the avoidance provision of section 522(f)(1) is available to debtors seeking to avoid a judicial lien that "impairs an exemption to which the debtor would have been entitled under section (b)" of section 522 of the Code. As permitted by section 522(b), Virginia has opted out of the federal exemptions specified in section 522(d).

Va. Code section 34-3.1 (1984 Repl. Vol.)

Under the exemption scheme adopted by Virginia, each debtor is entitled to a homestead exemption. Virginia Code section 34-4 provides in part that "[e]very householder or head of family shall be entitled . . . to hold exempt . . . real and personal property, or either, to be selected by him, . . . to the value not exceeding $5,000." Va. Code section 34-4 (1984 Repl. Vol.). But the Virginia statute provides that this homestead exemption "shall not extend to any execution order or other process issued on any demand . . . [f]or rent." Va. Code section 34-5(5) (1984 Repl. Vol.). Because under Virginia law an execution order or other process necessarily results in the creation of lien,[2] section 34-5(5) in essence

provides that any property encumbered by a judicial lien[3] arising out of a claim for rent may not be exempted.

The creditor argues that because the property at issue here is encumbered by a judicial lien arising out of a claim for rent and is thus not exempt under Va. Code section 34-5(5), the lien does not impair an exemption to which the debtors would be entitled. Thus, the creditor argues, the debtors may not avoid the lien under section 522 (f)(1).

The court is unpersuaded by this argument. To be sure, there are cases that support the creditor's position. See, Giles v. Credithrift of America, Inc. (In re Pine), 717 F.2d 281 (6th Cir. 1983), cert. denied, 466 U.S. 928, 104 S.Ct. 1711, 80 L.Ed. 183 (1984); Mc

Manus v. Avco Financial Services (Matter of McManus), 681 F.2d 353 (5th Cir. 1982); In re Shines, 39 B.R. 879 (Bankr. E.D. Va. 1984). In Pine, the court held that the lien avoidance provision of section 522(f) only comes into play after there has been a determination of what property is exempt under section 522(b). The court therefore concluded that debtors were precluded from avoiding a lien under section 522(f) where the state exemption statute provided that debtors could not exempt property encumbered by a lien. The Fifth Circuit reached a similar conclusion in Matter of McManus, 681 F.2d 353 (5th Cir. 1982), holding that since a Louisiana statute defined lien-encumbered property as not exempt, section 522(f) could not be used because the lien did not impair an exemption to

which the debtor was entitled. Accord, Allen v. Hale County State Bank, 725 F.2d 290 (5th Cir. 1984) (Texas exemption law applied); In re Rodgers, 68 B.R. 17 (N.D. Tex. 1986). In In re Shines, 39 B.R. 879 (Bankr. E.D. Va. 1984), the only relevant authority in Virginia, the bankruptcy court for the Eastern District of Virginia addressed the precise issue raised here. In that case, the debtors sought to use section 522(f) to avoid a judicial lien that arose from a creditor's garnishment of the debtors' wages under a judgment for unpaid rent. The court held that there was no impairment of an exemption because Va. Code section 34-5(5) rendered the debtors' exemption of the wages inapplicable as to the creditor's claim against the wages. 39 B.R. at 882. The

court therefore concluded that the lien could not be avoided under section 522(f).

The court, however, is not persuaded that the analysis employed by those courts is correct. Those decisions construe the operative language of section 522(f), that a lien may be avoided to the extent it "impairs an exemption to which the debtor would have been entitled", as mandating as a prerequisite for lien avoidance that state law classify the lien-encumbered property as exempt. In the court's view, that construction is not supported by the statutory language. Section 522(f) permits a debtor to avoid a lien that impairs an exemption to which the debtor "would have been entitled." The use of the phrase "would have been entitled"

denotes a condition contrary to fact. Thus, the court reads section 522(f) as permitting a debtor to avoid a lien if the lien impairs an exemption the debtor could claim under state but for the lien. In other words, to determine if a lien impairs an exemption, the court must look to the exemptions available under state law as if the lien sought to be avoided did not exist. If state law permits exemption of the property in the absence of the lien, then the debtor may utilize section 522(f) to avoid the lien, despite the state's classification of the lien-encumbered property as not exempt. Accordingly, the court concludes that section 522(f)(1) permits a debtor to avoid a judicial lien on property that would have been exempt if not encumbered by the lien.

The legislative history of the Code supports this interpretation. Both the House and Senate reports describe the lien avoidance provision that ultimately became section 522(f) as allowing debtors to exempt property "to the extent that the property could have been exempted in the absence of the lien." H.R. Rep. No. 595, 95th Cong., 1st Sess. 362 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6318; S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5862. See Brown v. Dellinger (In re Brown), 734 F.2d 119, 125 (2d Cir. 1984); Hall v. Finance One of Georgia Inc. (In re Hall), 752 F.2d 582, 587 (11th Cir. 1985).

Ample case law supports the court's conclusion as well. In Hall v.

Finance One of Georgia, Inc. (In re Hall), 752 F.2d 582 (11th Cir. 1985), the Court of Appeals for the Eleventh Circuit had to decide whether debtors in bankruptcy could utilize section 522(f) to avoid liens on property that Georgia law defined as not exempt because it was encumbered by a lien, an issue similar to the one raised in this case. Rejecting the approach employed by the Fifth Circuit in McManus and by the Sixth Circuit in Pine, the Hall court concluded that once a state lists a particular type of property as available exempt property, and further state action defining lien-encumbered property as not exempt is nevertheless subject to provisions of section 522(f). 752 F.2d at 586. Thus, the Eleventh Circuit held that section 522(f) permits debtors to avoid the

fixing of a lien on property if avoidance would allow a debtor to enjoy an exemption, notwithstanding the state's classification of lien-encumbered property as not exempt. See also Hershey v. Linzer (In re Hershey), 50 B.R. 329 (S.D. Fla. 1985); In re Vaughn, 67 B.R. 140, (Bankr. C.D. Ill. 1986); In re Thompson, 59 B.R. 686 (Bankr. N.D. Tex. 1986); In re Weiss, 51 B.R. 224 (Bankr. D. Colo. 1985). Significantly, the Fourth Circuit Court of Appeals in Dominion Bank of Cumberland, NA v. Nuckolls, 780 F.2d 408, 417-418 n.9 (4th Cir. 1985) (Hoffman, J., concurring), has questioned the validity of the holdings in McManus and Pine, stating that "the result in [those] cases probably is wrong . . . ." This indicates that the Fourth Circuit would likely follow the reasoning

of the Eleventh Circuit in Hall and reject the approach adopted by the Fifth and Sixth Circuits.

The court agrees with the view of the Eleventh Circuit that the language contained in the opt-out provision of section 522(b), which permits states to define available exemptions, does not suggest a result contrary to the one reached here. The broad grant of powers given states to define available exemptions does not mean that Congress authorized the states to enact legislation that conflicts with other provisions of the Bankruptcy Code. Rather, the import of the opt-out provision of section 522(b) is "merely that a state may decide to require that its debtors rely upon state-defined exemptions, instead of the list of

federal exemptions contained in section 522(d)." Hall, 752 F.2d at 587.

The court therefore finds no occasion for holding that Va. Code section 34-5(5), declaring nonexempt property encumbered by a judicial lien arising out of a claim for rent, precludes the use of the lien-avoidance provisions of section 522(f)(1). Since the lien encumbering the property at issue in this case is a judicial lien, and since in the absence of that lien the debtors would have been able to exempt the property under the homestead provision of Va. Code section 34-4, the court concludes that the debtors are empowered by section 522(f)(1) to avoid the lien.

CONCLUSION

Based upon the foregoing, the

court will enter an order granting the debtors' motion to avoid the judicial lien encumbering their property.

Copies of the foregoing Memorandum Opinion are directed to be mailed to: C. Waverly Parker, Esq., Counsel for Richard Green; W. Stephen Scott, Esq., Counsel for Debtors; Leroy R. Hamlett, Jr., Esq., Trustee; and Charles and Janet Snow, Debtors.

_____
William E. Anderson
U.S. Bankruptcy Judge

Dated: March 17, 1987

ENDNOTES

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

IN RE:

CHARLES RICHARD SNOW and
JANET LEE SNOW

Debtors.

Case No. 686-01203

RICHARD GREEN

Plaintiff

v.

CHARLES RICHARD SNOW and
JANET LEE SNOW

Defendants

Adversary Proceeding No. 686-01203(1)

CHARLES RICHARD SNOW and
JANET LEE SNOW

Plaintiffs

v.

RICHARD GREEN

Defendant

Adversary Proceeding No. 686-01203(2)

ORDER

At Charlottesville, Virginia, in said District, this 17th day of March 1987.

For the reasons stated in the accompanying Memorandum Opinion entered this date, it is hereby ORDERED and ADJUDGED that the debtors' motion to avoid lien be and hereby is granted; and that the judicial lien in the debtors' automobile and other personal property specified in the Sheriff's Return dated November 5, 1986 be and hereby is voided.

Copies of the foregoing Order are directed to be mailed to: C. Waverly Parker, Esq., Counsel for Richard Green; W. Stephen Scott, Esq., Counsel for Debtors; Leroy R. Hamlett, Jr., Esq., Trustee; and Charles and Janet Snow, Debtors.

Entered: March 17, 1987

William E. Anderson
U.S. Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

In Re: CHARLES RICHARD SNOW
JANET LEE SNOW,

Debtors

BANKRUPTCY NO. 686-01203-C

CHARLES RICHARD SNOW
JANET LEE SNOW,

Appellees

v.

RICHARD GREEN,

Appellant

CIVIL ACTION NO. 87-0035-C

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

This matter is before the court on an appeal from a decision of the bankruptcy court for this district allowing appellees to avoid the fixing of a judicial lien on property claimed as exempt under the Virginia homestead exemption. For the reasons elaborated below, that decision of the bankruptcy court is reversed.

A. Procedural Posture

Appellant Green obtained a state court judgment against appellee debtors, the Snows, on October 15, 1986, for unpaid rent due appellant. In re Snow, 71 Bankr. 186, 187 (Bankr. W.D. Va. 1987). In order to collect on his judgment, appellant obtained a writ of fieri facias against items of personal property of the appellees on October 29, 1986. Id. By obtaining this writ, a judicial lien upon the appellees' property was created. Virginia Code section 8.01-478 (1984). On november 10, 1986, pursuant to Virginia Code section 34-4, appellees recorded a Homestead Deed for personal property. Two days later, appellees filed a joint petition declaring Chapter 7 bankruptcy. Id. This matter was heard in bankruptcy court

as the appellees attempted to avoid the previously executed judicial lien by claiming that the property against which that writ was levied was exempt under Virginia's homestead provision. Virginia Code section 34-4 (1984). Appellees sought to avoid the judicial lien by invoking the lien avoidance procedure found in 11 U.S.C. section 522(f)(1) (1987). Appellant argued that, because Virginia recognizes exceptions to the homestead exemption for certain kinds of debt, e.g., debts for rent, the debtors cannot successfully avoid this judicial lien. Virginia Code section 34-5 (1984). The bankruptcy court ruled that the debtors could successfully avoid the lien, finding that there was "no occasion for holding that Va. Code section 34-5(5), declaring non-exempt property

encumbered by a judicial lien arising out of a claim for rent, precludes the use of the lien avoidance provisions of section 522(f)(1)." In re Snow, 71 Bankr. at 189.

B. Statutory Background

The Bankruptcy Reform Act of 1978 created a series of exemptions for those entering bankruptcy. 11 U.S.C. section 522. However, paragraph (b)(1) also gives each state the power to opt out of that structure of exemptions and to replace the federal scheme with its own set of exemptions. This "opt out" provision was the result of legislative compromise. The House of Representatives wanted to create a structure of exemptions where the debtor could choose between the federal exemption structure and those exemptions afforded by the

debtor's state law. On the other hand, the Senate preferred to restrict all debtors to only those exemptions afforded them under their state law. Haines, Section 522's Opt Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State, 1983 Ariz. St. L.J. 1, 5-10; Klee, Legislative History of the New Bankruptcy Law, 28 De Paul L. Rev. 941, 952-57 (1979); Ulrich, How Bankruptcy Exemptions Work: Virginia as an Illustration of Why The "Opt Out" Clause Was A Bad Idea, 8 G.M.U. L. Rev. 1, 2 (1985).

Virginia is one of the majority of states which have chosen to opt out and to restrict their domiciliaries to the structure of exemptions provided by the State Code. Virginia Code section 34-3.1 (1984). Within a year after the passage of the Bankruptcy Reform Act, the

General Assembly for the Commonwealth of Virginia opted out of what are "the concededly more liberal federal exemptions." In Re Boyd, 11 Bankr. 690, 693 (Bankr. W.D. VA. 1981). One of the exemptions to which debtors have recourse for their protection in Virginia is the homestead exemption. This provision provides, in relevant part,

> Every householder or head of a family residing in this State shall be entitled . . . to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding $5,000.

Va. Code section 34-4 (1984). The Virginia homestead exemption is qualified by certain statutorily created

exceptions. For example, under the terms of the Statute, the homestead exemption cannot protect the claimed property from an execution order or other form of process growing out of a demand for rent. Va. Code section 34-5(5) (1984).[5]

Section 522 of the Bankruptcy Code also creates a mechanism under which a debtor can avoid the imposition of a judicial lien. That section provides, in pertinent part,

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b)

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[5] The scope of Virginia's homestead exemption has been criticized as being woefully inadequate in the face of modern economic conditions. Note, The Failure of the Virginia Exemption Plan, 21 W.M. & Mary L. Rev. 851, 871 (1980).

> of this section, if such lien is . . . a judicial lien . . .
> .

11 U.S.C. section 522(f)(1) (1987). It is this provision upon which appellees rely in order to avoid the lien earlier attached on their property claimed under the Virginia homestead exemption.

C. The Interaction Between The Virginia and Federal Provisions

By the plain language of the statute, the Virginia legislature clearly intended both to create a homestead exemption and to abrogate that exemption for certain species of claims by creditors. Va. Code section 34-4, 34-5. Counterpoised to that scheme of exemption and exceptions, section 522(f)(1) of the Bankruptcy Code creates a mechanism whereby debtors can avoid liens on property which would have otherwise been

exempted, except for that lien. 11 U.S.C. section 522(f)(1). There is the potential for an apparent clash between state and federal bankruptcy provisions. Certainly conflict can develop between the property which a debtor would seek to include under the Virginia homestead exemption and the kinds of claims which the Virginia legislature authorized to break through that exemption. Epperley v. Woodyard, 4 Bankr. 124, 127 (Bankr. W.D. Va. 1980). The Fourth Circuit has held that if the clash or conflict is one between federal and state bankruptcy provisions then the federal provision must prevail.

> Because Congress has the power under the Constitution to establish uniform bankruptcy laws, U.S. Const. Art. 1, section 8, and has enacted a specific provision for exemptions, 11 U.S.C. section

> 522, we must adopt an interpretation of Virginia's law that does not conflict with the Act's exemption provision.

Cheeseman v. Nachman, 656 F.2d 60, 63 (4th Cir. 1981) (citation omitted).

It is important to distinguish between subsection (b) of 11 U.S.C. section 522 which provides for federal exemptions and allows states to opt out of the federal exemption scheme, and to put in place the particular exemption scheme of the state, and subsection (f) which creates the mechanism of lien avoidance. The opt out power of the states applies to subsection (b) and not to subsection (f).[6] States cannot opt

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[6] As a district court in the Eastern District of Virginia observed, "The power to avoid those interest contained in section 522(f) indeed operates independently of a state's choice regarding its exemption scheme."

out of the lien avoidance mechanism. However, the lien avoidance mechanism refers back to the structure of exemptions as defined in subsection (b), whether that structure is derived directly from the federal provisions or from the state provisions which are substituted for those federal provisions. When one examines the interaction between subsections (b) and (f), it is evident that this ostensible conflict between exceptions to the homestead exemption and the lien avoidance provision is only an apparent or facial conflict, one which exists because the bankruptcy court below did not fully appreciate the full scope of the Virginia homestead exemption. The court below fit an incomplete state

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O'Malley v. Rapidan River Farm, 24 Bankr. 900, 903 (E.D. Va. 1982).

exemption structure into the niche provided in subsection (b).

The bankruptcy court below read this case as involving a clash between claims growing out of the federal lien avoidance procedure and the exceptions to the Virginia homestead exemption and thus saw its charge as having to vindicate one claim or the other. That court resolved the perceived conflict by ruling that the lien avoidance procedure of section 522(f) negated the exception, in this case for rent, to Virginia's homestead exemption. The bankruptcy court concluded that

> The use of the phrase 'would have been entitled' denotes a condition contrary to fact. Thus, the court reads section 522(f) as permitting the debtor to avoid a lien if the lien impairs an exemption the debtor could claim under state [law] but for the lien.

In re Snow, 71 Bankr. at 188 (emphasis in original). The decision of the bankruptcy court misidentifies what will count as the relevant "condition contrary to fact." If one reads the "condition contrary to fact" clause of section 522(f) as broadly as does the court below, then, under that court's analysis, the lien avoidance procedure seemingly would sweep in every exception to the homestead exemption under state law and would threaten to render those exceptions a null set. When exceptions to exemptions are defined by the type of claim allowed, then, by their very definition, they would always be vulnerable to negation by the lien avoidance procedure as construed by the bankruptcy court below.

Once again, the difficulty in the interpretation of the bankruptcy court below is that it misreads the scope of the Virginia homestead exemption. In effect, the court below takes the Virginia homestead exemption simpliciter to be encompassed only by Virginia Code section 34-4 and lops off the exceptions enumerated in section 34-5. That court has adopted a linear view of the way the homestead exemption process works. Presumably, under the bankruptcy court's interpretation, a debtor claims certain property under the homestead exemption as a discrete action. Only after the dust has settled from that process of claiming, does one then turn to look at the types of claims advanced by a creditor under the exceptions to that exemption. The court below interposed

the "condition contrary to fact" gloss as a trip-wire between these two steps and thus wedges the lien avoidance procedure of 11 U.S.C. section 522(f) between section 34-4 and 34-5 of the Virginia Code.

However, the problem with the interpretation below is that it presents an incomplete picture of the Virginia homestead exemption. It is not the case that the exemption exists pristine, without exception, pervasive, and discrete and absolute, and that then, only further down this imagined linear continuum, does one encounter the question of exceptions and their relation to the lien avoidance procedure. Rather, it is the case that the Virginia homestead exemption, taken as a whole, includes both the universe of what a

debtor can claim as an exemption and the exceptions to what can be claimed under that exemption. Perhaps an appropriate, if very informal, metaphor to use in describing the Virginia homestead exemption is to compare it to a wedge of Swiss cheese. Just as the entirety of the wedge is composed of both the cheese and the holes, the entirety of the Virginia homestead exemption is composed both of the substantive provision allowing a debtor to exempt certain property and the exceptions to that exemption which, in this court's metaphor, constitute the holes. Properly understood, the holes are a part of that wedge of cheese and one takes that wedge subject to the holes.[7]

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[7] To extend the metaphor, critics of the scope of the Virginia

Therefore, in the case before us, the "condition contrary to fact" mechanism to which the court below refers actually cannot come into play, for the appellees in this case cannot point to an exemption to which they would otherwise have been entitled for lien avoidance purposes, because one natural chink or hole in the homestead exemption protection which they claim is the exception for claims for rent. When a debtor claims under the homestead exemption he claims with all the exceptions to that exemption implied by that claim.[8] The exemption, taken in its

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homestead provisions might well argue that the wedge of Virginia cheese contains too high a ratio of holes to cheese.

[8] As a point of comparison, the Virginia Supreme Court had held in the past that the option to waive the

entirety, includes those exceptions. To hold otherwise would eviscerate virtually all instances under which the exceptions to the Virginia homestead exemption could exist, for a debtor could invoke the doctrine of a "condition contrary to

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homestead exemption is fully a concomitant part of the exemption itself, as it then existed. Homeowners' Loan Corp. v. Reese, 170 Va. 275, 279, 197 S.E. 625, 626 (1938). A district court in the Eastern District of Virginia has more recently found that Virgi2nia's waiver option does not offend public policy. "Virginia has spoken on the issue and established that the right to waive the homestead is not unconstitutional or against public policy." Barbarossa v. Beneficial Finance Corp., 438 F. Supp. 840, 842 (E.D. Va. 1977). The homestead waiver provision is simply another example of how a limitation, modification or "hole" in the exemption is seen to be a part of the exemptive structure itself. The Fourth Circuit has even more recently held such waivers to be enforceable although, in that case, the court allowed the debtor to invoke the lien avoidance mechanism of section 522. Dominion Bank of Cumberlands v. Nuckolls, 780 F.2d 408, 411 (4th Cir. 1985).

fact" as espoused by the court below and say that "but for this claim (e.g., for rent, for taxes, or for services rendered by a mechanic) this property would be exempt and, therefore, it is exempt."

In point of fact, in several instances bankruptcy courts in Virginia have interpreted the Virginia homestead exemption to include both the cheese and the holes and, thus, have recognized the vitality of creditor claims under the exceptions to the homestead exemption provided in section 34-5 of the Virginia Code. In re Shines, 39 Bankr. 879 (Bankr. E.D. Va. 1984); In re Barnes, 29 Bankr 677 (Bankr. W.D. Va. 1983). In both of these cases a debtor sought to protect wages from garnishment under the provisions of the homestead exemption, but in both cases a creditor was allowed

to reach those wages to satisfy a debt for rent. In the earlier case, the bankruptcy court concluded that:

> By virtue of Va. Code section 34-3.1, Virginia has excluded itself from the federal exemptions provided in section 522 and consequently, the exemption statutes contained in the Code of Virginia prevail. Va. Code 34-4 provides for the exemption of wages under garnishment along with other enumerated exemptions. Va. Code section 34-5, however, designates kinds of debts which cannot be exempted under section 34-4. Among these categories is a debt for rent. Plaintiff is therefore not entitled to exempt the subject wages.

In re Barnes, 29 Bankr. at 678. In Shines as well, the bankruptcy court allowed the creditor for rent to reach wages which were claimed as protected from garnishment under the homestead exemption. In so doing, that court noted

that Va. Code section 34-5 seemingly moves landlords and certain other classes of creditors to "the front of the line" in order to satisfy their claims against debtors. In re Shines, 39 Bankr. at 881, 882. The exceptions to the Virginia homestead exemption do indeed have the effect of giving landlords and certain other selected creditors a higher status and advantages over other classes of creditors. This scheme runs counter to several goals underlying the creation of the federal Bankruptcy Code and raises several unsettling policy questions.

D. The Policy Implications of the Opt Out Scheme in Virginia's Homestead Exemptions

A number of courts and a wide-ranging group of commentators have noted that there are serious policy questions which are brought to the fore by the

national patchwork of state exemption structures resulting from the opt out provisions of 11 U.S.C. section 522(b). As the court in Shines has noted, the exceptions to the Virginia homestead exemption bring into sharp focus the kinds of problems and "the unexpected ramifications of Congress permitting the states to 'opt out' of the federal exemption scheme." In re Shines, 39 Bankr. at 881. At a general level, the creation of the opt out alternative has led to a lack of uniformity and consistency among the co-existing state exemption structures. Dominion Bank of Cumberlands v. Nuckolls, 780 F.2d 408, 414 (4th Cir. 1985) (Hoffman, J., concurring specially) (referring to section 522 as "an odd creation" and concluding that "if law making is like

sausage making, section 522(b) is a rare piece of sausage.")[9] The opt out provision of the Bankruptcy Reform Act of 1978 has also been criticized because it is allegedly cumbersome, because it "compels federal judges to decide obscure issues of state law," and because "incorporating the state law into the federal code creates the potential for conflict between the two systems." Ulrich, 8 G.M.U.L. Rev. at 3.

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[9] Despite the admitted patchwork which has devolved from the opt out provision, section 522 has withstood a challenge that alleged a lack of uniformity rising to the level of a constitutional violation. Sullivan v. West, 680 F.2d 1131, 1133-34 (7th Cir. 1982); cert. denied 459 U.S. 992. Several bankruptcy courts have opined that a state exemption scheme could be constitutionally infirm if it were to thwart substantially the federal policy goals. In re Parrish, 19 Bankr. 331, 335 (Bankr. D. Colo. 1982); In re Vasko, 6 Bankr. 317, 322 (Bankr. N.D. Ohio 1980).

Perhaps the most telling criticism of the ramifications, intentional or unintentional, of the opt out provision is that it imperils the fundamental goals of the Bankruptcy Code and the ideals which allegedly inspired that Code. An oft repeated bit of legal piety is that the goals of bankruptcy policy are protecting the creditors and providing the debtor a chance at a fresh start. As a commentator has noted, it is frequently the case that those goals are realized only from a systemic perspective and not in each individual instance or, perhaps, even necessarily in a majority of instances. Hallinan, The "Fresh Start" Policy in Consumer Bankruptcy: An Historical Inventory and an Interpretative Theory, 21 U. Rich. L. Rev. 49, 50 (1986).

There are two ways in which the Virginia Household exemption, understood as encompassing its exceptions as well, threatens to imperil ideals of the bankruptcy code. One goal of the bankruptcy code is to produce an equality among creditors, to have the levelling effect of placing them on relatively equal footing. As noted in Shines, "Under the old Bankruptcy Act a creditor for rent did indeed receive a priority position, in distribution of estate assets, however, that priority has been eliminated by the Bankruptcy Reform Act." In re Shines, 39 Bankr. at 881. That court also goes on to conclude that

> All of this demonstrates that the Bankruptcy Code specifically intended to eliminate state-created priorities especially those provided for landlords. Therefore, what Va. Code 34-

> 5(5) does is to give the creditor in this instance a priority or preference from almost any other creditor . . . . In doing so, the Virginia statute disrupts the federal distribution scheme and its underlying goal for equality among classes of creditors.

Id. at 882. The Virginia Code at this point seems to run counter to the spirit of the Bankruptcy Code and limits, if it does not imperil, one of its goals. The court in Shines nonetheless held that those provisions of the Virginia Code mandated that a creditor for rent could reach property which was claimed under the Homestead exemption. Id. That court found, as does this court, that while there is an appreciable measure of dissonance between one of the quickening ideals of the bankruptcy code and the scope and limitations of the Virginia homestead exemption (with its

exceptions), the Commonwealth of Virginia was exercising a permissible option in deciding to opt out of the federal structure of exemptions and in creating the limited and exception-riddled homestead exemption found in sections 34-4 and 34-5 of the Virginia Code.

These portions of the Virginia Code also trim or pare back another historic goal of the bankruptcy code. Perhaps the most frequently invoked legal piety in regard to bankruptcy law is that the bankruptcy code is meant to provide the debtor with a fresh start.

> This purpose of the Act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort

> unhampered by the pressure and discouragement of pre-existing debt.

Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). The prominence of the ideal of "the fresh start" as a central article of faith in bankruptcy dogma is reflected in recent cases as well. See e.g., Cheeseman, 656 F.2d at 63-64. It may be legitimate to worry, as some commentators have done, whether the broad range of exceptions allowed to the Virginia homestead exemption tends to undercut the opportunities which many debtors in Virginia would have to gain a fresh start. Comment, In re Cheeseman: A Judicial Revision of Virginia's Homestead Exemption Laws, 16 U. Rich. L. Rev. 391, 403-04 (1982). It may even be fair to conclude, as did the court in Shines, that Va. Code section 34-5 "disrupts the

second major goal of the Bankruptcy Reform Act of 1978, which is to provide a debtor with a fresh start after bankruptcy, by permitting this creditor to collect a dischargeable debt out of otherwise exempt property." In re Shines, 39 Bankr. at 882.[10]

Does this case present an instance where one could justify a jurisprudence of paternalism, and generously interpret the scope and inviolability of the Virginia homestead exemption, leaving to one side the

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[10] It may also be true the patchwork and cumbersome nature of section 522 also imperils the "fresh start" goal, for the defects of the opt out scheme may lead to increased litigation and "[l]itigation expenses are not calculated to encourage the debtor's fresh start." Ulrich, How Bankruptcy Exemptions Work: Virginia as an Illustration of why the "opt Out" Clause Was a Bad Idea, 8 G.M.U. L. Rev. 1, 3 (1985).

exception provision? It is true, as one court has noted, citing venerable Virginia Supreme Court precedents, that

> The homestead exemption laws must be liberally construed in favor of the householder. Wilkinson v. Merrill, 87 Va. 513, 12 S.E. 1015 (1891). It is a shield to protect the helpless and unfortunate debtor from the importunate and incompassionate creditor. Linkenhoker v. Detrick, 81 Va. 44 (1885).

Epperley v. Woodyard, 4 Bankr. at 127. While it is legitimate to construe exemption provisions liberally and broadly in favor of the debtor, they cannot be construed so broadly as, in effect, to create provisions more robust or more potent than those which the legislature intended. As the Fourth Circuit concluded,

> Long standing Virginia

> precedent establishes that exemption statutes are to be construed liberally. However, '[t]he liberal construction required to be given to our constitutional and statutory provisions does not authorize the court to reduce or enlarge the exemption, or to read into the exemption laws an exception not found there.'

Tignor v. Parkinson, 729 F.2d 977, 981 (4th Cir. 1984) (quoting Goldburg Co. v. Salyer, 188 Va. 573, 582, 50 S.E.2d 272, 277 (1948), (other citations omitted).

In order to assure that debtors have the degree of protection and the accessibility to a fresh start which is arguably braced by the spirit of the Bankruptcy Code, one might feel drawn to follow the decision of the bankruptcy court below in this matter. However, while it is established that a court is free to construe liberally exemption provisions, this court is constrained by

its understanding of its proper role to refrain from extending the reach and grasp of the Virginia homestead exemption when the only warrant for that extension would be the relatively abstract and sometimes inchoate policy ideals of the Bankruptcy Code.[11]

The dissonance between the detailed provisions of the Virginia homestead exemption with its exceptions

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[11] The Fourth Circuit has been criticized for being too activist when it read Virginia's homestead exemption as allowing each spouse in a household to claim the exemption. Granger v. Watson, 754 F.2d 1490, 1492 (9th Cir. 1985). ("Yet Cheeseman treats the opt-out provision as an insignificant alteration of the House's exemption provisions.") (criticizing Cheeseman v. Nachman, 656 F.2d 60 (4th Cir 1981)). In dicta, the court in Cheeseman has been characterized as "[m]odifying state law to fit its [the court's] perceived goals of the bankruptcy laws . . . ." Dominion Bank of Cumberlands, 780 F.2d 408, 415 (4th Cir. 1985) (Hoffman, J., concurring specially).

and the aspirations and policy goals of the Bankruptcy Code highlight the difficulty of this decision. In adjudicating this matter, this court will either tend to curb the aspirations underlying the federal bankruptcy code or otherwise will frustrate the clear intent of the Virginia legislature. While the specific results of this choice may be regrettable in the circumstances of this case, this court's understanding of the law leaves it no course but to find that the Virginia homestead exemption implicitly includes the exceptions found in Va. Code section 34-5 as part and parcel of any exemption which debtors would claim.

The result, in this case may seem harsh and, indeed, is quite unfortunate for the appellees. The

difficulties presented to these appellees and to other debtors who will succeed to their position are created in large part by what Judge Hoffman has so persuasively described as a "poorly crafted legislative scheme." Dominion Bank, 780 F.2d at 414-17. (Hoffman, J., concurring specially). Perhaps it could be argued, as some commentators have done, that both Congress and the Virginia legislature can -- and should -- take appropriate action to resolve the problem presented here. Ulrich, 8 G.M.U.L. Rev. at 7-18; Note, 21 W.M. & Mary L. Rev. at 871; Comment, 16 U. Rich. L. Rev. at 403. Nonetheless, neither legislative body has, to this point, chosen to do so and this court must adjudicate within the context of the various statutory provisions discussed supra.

E. Conclusion

For the reasons stated above, this court reverses the judgment of the bankruptcy court and finds that the appellees may not avoid the judicial lien imposed upon their property to satisfy a judgment for rent.

An appropriate Order shall this day issue.

ENTERED: _____
Judge

_____
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

In Re: CHARLES RICHARD SNOW
JANET LEE SNOW,

Debtors

BANKRUPTCY NO. 686-01203-C

CHARLES RICHARD SNOW
JANET LEE SNOW,

Plaintiffs

v.

RICHARD GREEN,

Defendant

CIVIL ACTION NO. 87-0035-C

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that:

1. The judgment of the United States Bankruptcy Court for the Western District of Virginia of March 17, 1987, shall be, and it hereby is, reversed.

2. This matter shall be, and it hereby is, remanded to the United States Bankruptcy Court for the Western District of Virginia for further proceedings not inconsistent with this court's memorandum opinion and order.

3. This case shall be, and it hereby is, dismissed and stricken from the docket of this court.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: _____
Judge

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

11 USC Section 522. Exemptions

(a) In this section --

(1) "dependent" includes spouse whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b) Notwithstanding section 541 of this title [11 USCS section 541], an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of

this title [11 USCS section 302] and individual cases filed under section 301 or 303 of this title [11 USCS section 301 or 303] by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules [USCS Rules, Bankruptcy, Rule 1015(b)], one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, un-

less the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such in-

terest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title [11 USCS section 502] as if such debt had arisen, before the commencement of the case, except --

(1) a debt of a kind specified in section 523(a)(1) or 523(a)(5) of this title [11 USCS section 523(a)(1) or (a)(5)]; or

(2) a debt secured by a lien that is --

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549 or

724(a) of this title [11 USCS section 544, 545, 547, 548, 549, or 724(a)]; and

(ii) not void under section 506(d) of this title [11 USCS section 506(d)]; or

(B) a tax lien, notice of which is properly filed.

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to

exceed $1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $200 in value in any particular item or $4,000 in aggregate value, in household furnishing, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $400 plus up to $3,750 of any unused amount of the exemption provided under

paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $4,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title [11 USCS section 542(d)], in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive -

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veteran's benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless -

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on

account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408 or 409) [26 USCS section 401(a), 403(a),(b), 408, or 409].

(11) The debtor's right to receive, or property that is traceable to -

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of

an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(e) A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unen-

forceable in a case under this title [11 USCS sections 101 et seq.] with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title [11 USCS sections 101 et seq.].

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -

(1) a judicial lien; or

(2) a nonpossessory, nonpurchase-money security interest in any -

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

(g) Notwithstanding sections 550 and 551 of this title [11 USCS section 550 and 551], the debtor may exempt under subsec-

tion (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title [11 USCS section 510(c)(2), 542, 543, 550, 551, or 553], to the extent that the debtor could have exempted such property under subsection (b) of this section is such property had not been transferred, if -

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided such transfer under subsection (f)(2) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a set-off to the extent that the debtor could

have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if -

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title [11 USCS section 544, 545, 547, 548, 549, or 724(a)] or recoverable by the trustee under section 553 of this title [11 USCS section 553]; and

(2) the trustee does not attempt to avoid such transfer.

(i) (1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title [11 USCS section 550], the same as if the trustee had avoided such transfer, and may exempt any proper-

ty so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title [11 USCS section 551], a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title [11 USCS section 544, 545, 547, 548, 549, or 724(a)], under subsection (f) or (h) of this section, or property recovered under section 553 of this title [11 USCS section 553], may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (g) and (i) of this section only to the extent that the debtor has

exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except -

(1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this

section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

(Nov. 6, 1978, P.L. 95-598, Title I, section 101, 92 Stat. 2586; July 10, 1984, P.L. 98-353, Title III, Subtitle A, section 306, Subtitle H, section 453, 98 Stat. 353, 375; Oct. 27, 1986, P.L. 99-

554, Title II, Subtitle C, section 283 (i), 100 Stat. 3117.)

TITLE 34.

Homestead and Other Exemptions

CHAPTER 1.

GENERAL PROVISIONS

Section 34-3.1. Property specified in Bankruptcy Reform Act not exempt. -

No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of section 522 of the Bankruptcy Reform Act (Public Law 95-598), except as may otherwise be expressly permitted under this title. (1979, c. 692.)

* * * *

CHAPTER 2.

HOMESTEAD EXEMPTION OF HOUSEHOLDER

Section 34-4. Exemption created. -

Every householder or head of a family residing in this State shall be entitled, in addition to the property or estate which he is entitled to hold exempt from levy, distress or garnishment under sections 34-26, 34-27 and 34-29, to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding $5,000. The word "debt", as used in this title, shall be construed to include a liability incurred as the result of an unintentional tort. (Code 1919, section 6531; 1918, p. 487, 1975, c. 466; 1977, c. 496; 1978, c. 231.)

Section 34-5. To what debts exemption shall not apply. -

Such exemption shall not extend to any execution order or other process issued on any demand in the following cases:

(1) For the purchase price of such property or any part thereof. If the property purchased and not paid for be exchanged for or converted into other property by the debtor, such last named property shall not be exempted from the payment of such unpaid purchase money under the provisions of section 34-4.

(2) For services rendered by a laboring person or mechanic.

(3) For liabilities incurred by any public officer or officer of a court, or any fiduciary, or any attorney at law for money collected.

(4) For a lawful claim for any taxes, levies or assessments.

(5) For rent.

(6) For the legal or taxable fees of any public officer or officer of a court.

(7) Such exemption shall not be claimed or held in a shifting stock of merchandise or in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration. A stock of merchandise shall be considered a shifting stock within the meaning of this paragraph after an assignment by the owner thereof for the benefit of creditors and after a voluntary or involuntary adjudication in bankruptcy.

(8) For the support of minor children. (Code 1919, section 6531; 21918, p. 487; 1956, c. 637; 1986, c. 218)

1. The property levied upon, identified in a Sheriff's Return dated November 5, 1986, includes an automobile and various other items of the debtors' personal property.

2. See Va. Code section 8.01-478 (1984 Repl. Vol.); In re Lamm, 47 B.R. 364 (E.D. Va. 1984).

3. Section 101(32) of the Bankruptcy Code defines a judicial lien as a "lien obtained by judgment, levy, sequestion, or other legal or equitable process or proceeding." 11 U.S.C. section 101(32) (West 1987).